Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 78-555

DONALD S. WARREN,
Petitioner,
v.
C. J. KUIPER, STATE ENGINEER,

and W-Y GROUND WATER MANAGEMENT DISTRICT,
Respondents.

BRIEF IN OPPOSITION OF RESPONDENTS C. J. KUIPER, STATE ENGINEER, AND COLORADO GROUND WATER COMMISSION TO PETITION FOR A WRIT OF CERTIORARI TO THE COLORADO SUPREME COURT

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To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States.

C. J. Kuiper, State Engineer, and the Colorado Ground Water Commission, Respondents herein, pray that the Petition for a Writ of Certiorari on file herein concerning the judgment of the Colorado Supreme Court entered in the above-entitled case on June 12, 1978, be denied.

INTRODUCTION

Respondents concur in the Petitioner's presentation of the Opinions Below, Jurisdiction, Question Presented, and Statute Involved. Pages 2-4 of the Petition.

STATEMENT

Respondents concur in the Petitioner's factual statement of this matter (pages 4-6 of the Petition) except as follows:

1. Petitioner states that

> by August 9, 1973, [he] . . . had completed construction of a well and irrigation system, and the well itself had been pumped for test purposes. However, the system was not operated because the growing wheat crop did not need supplemental water, and to have applied water would have constituted waste under the circumstances.

Page 5 of the Petition.

Respondents submit that the Petitioner's anticipatory characterization of "waste" ignores in actuality the substantive, non-federal constitutional issues addressed to and resolved by the Colorado Supreme Court. Those issues concern the basic fact that the Petitioner, for whatever reason or reasons, allowed his validly issued conditional permit to expire for failure to comply with the timeliness requirements of C.R.S. 1973, 37-90-108(3). *See:* Pages 1a-6a, Appendix A to the Petition; *see also:* page 5 of the Petition, wherein the Petitioner unequivocally states that

> . . . when the time stated on the conditional permit expired [,he] . . . was unable to demonstrate that water from the well had been put to beneficial use as required

> by C.R.S. 37-90-108 (1973). Further, Petitioner did not apply in a timely fashion for an extension of time.

2. Petitioner states that

> in that action [the state trial court litigation] Petitioner introduced evidence that . . . the requirements of C.R.S. 37-90-108 (1973) had been selectively enforced against him in violation of his rights under the fourteenth amendment of the United States Constitution. . . .

Page 5 of the Petition.

Respondents submit that the Petitioner's characterization of the evidence in this respect is conclusory and unsupported by the record. *See:* Appendices A and B to the Petition. The latter Appendix contains a specific finding of fact by the state trial court that refutes the Petitioner's statement. *See:* Page 3b, Appendix B to the Petition.

3. Petitioner states that he alleged before the Colorado Supreme Court

> . . . error on the part of the District Court in holding that discriminatory enforcement of the statute was not violative of his federal constitutional rights.

Page 6 of the Petition.

Respondents submit that the Petitioner's statement of the trial court's holding in this respect is erroneous. *See:* Pages 3b and 4b, Appendix B to the Petition.

4. Petitioner states that

> the Colorado Supreme Court affirmed the judgment of the District Court . . . without responding specifically to

> Petitioner's legal arguments concerning his federal constitutional rights. . . .

Page 6 of the Petition.

Respondents submit that this statement is simply and totally unfounded. *See:* Page 7a, Appendix A to the Petition.

REASONS FOR DENYING THIS WRIT

The statutes referenced throughout the Petition establish and maintain a reasonable mechanism for the appropriation of designated ground water.[1] The Colorado legislature intended through those statutes to create "a permit system for the allocation and use of this scarce resource." Page 5a, Appendix A to the Petition.

The Colorado Supreme Court specifically held that the statutes involved in the case at bar create time limits for the completion of an appropriation, that these statutes as well as the administrative guidelines of the Colorado Ground Water Commission "afford appropriators the opportunity to obtain extensions upon a showing of good cause," but that the Petitioner

> who had sought and been granted previous extensions, had failed to seek an additional extension, failed to

[1]The resource "designated ground water" is defined by statute to mean:

> . . . that ground water which in its natural course would not be available to and required for the fulfillment of decreed surface rights, or ground water in areas not adjacent to a continuously flowing natural stream wherein ground water withdrawals have constituted the principal water usage for at least fifteen years preceding the date of the first hearing on the proposed designation of the basin, and which in both cases is within the geographic boundaries of a designated ground water basin.

C.R.S. 1973, 37-90-103(6).

> place water to beneficial use within the life of the permit, and permitted his conditional permit to expire.

Pages 5a and 6a, Appendix A to the Petition; *see also:* Page 4b, Appendix B to the Petition.

Respondents do not understand the Petitioner to be attacking the validity, applicability, or fairness of the statutory time limits contained in C.R.S. 1973, 37-90-108, *as amended.* Respondents submit that the affirmance by the Colorado Supreme Court of the trial court holding in this matter (respectively Appendices A and B to the Petition) is a complete and continuing refutation of the Petition. Assuming, however, *arguendo* that the Colorado Ground Water Commission may have treated other appropriators differently, as it may well have pursuant to the provisions of C.R.S. 1973, 37-90-108(3) and 37-90-108(4) (1977 Supp.),[2] the Respondents submit that it is basic to the constitutional law of equal protection that differential treatment of persons who plausibly belong to the same class is justified when the rationale therefor is reasonable. *See generally: McGowan v. Maryland,* 366 U.S. 420 (1961); *People ex rel. Dunbar v. First Nat'l Bank,* 144 Colo. 412, 356 P.2d 967 (1960).

The operative facts in the case at bar occurred prior to the amendatory legislation of 1975. See footnote 2 and accompanying text, *ante.* Additionally, any differential treatment received by other permittees was based upon extenuating circumstances, whereas the state trial court specifically found that the Petitioner was knowledgeable in the necessities for and the procedures involved in the application for and granting of time extensions under the Colorado Ground Water Management Act, C.R.S. 1973, 37-90-101 *et seq.* (1977 Supp.) (hereinafter referred to as "the Act"). *See:* Pages 3b

[2]Colo. Sess. Laws 1975, Ch. 313, *amending* C.R.S. 1973, 37-90-108. See Appendix hereto.

and 4b, Appendix B to the Petition. Thus, there was a reasonable rationale for any differential treatment of the Petitioner.

The Petitioner contends (Page 7 of the Petition) that the holding of the Colorado Supreme Court in the matter at bar is inconsistent with its prior holdings; and cites to the case of *Fellhauer v. People,* 167 Colo. 320, 447 P.2d 986 (1969) as authority therefor. The Respondents submit that the holding below is indeed consistent with prior case law of the Colorado Supreme Court in general, and in particular that the *Fellhauer* case, *supra,* is totally inapposite. That litigation involved a different type of resource (alluvial water tributary to a surface stream) as well as a completely different statute.[3] In no way was the Act ever involved in the *Fellhauer* litigation cited on Page 7 of the Petition, and in this respect the Petitioner's argument presents a misleading interpretation.[4]

The Colorado Supreme Court has previously upheld the constitutionality of the Act. *See: Kuiper v. Lundvall,* 187 Colo. 40, 529 P.2d 1328 (1975), *cert. denied,* 421 U.S. 996 (1975). The administration of the Act by the Colorado Ground Water Commission in the matter at bar is harmonious with established case precedents as well as generally recognized principles of constitutional law.

[3]C.R.S. 1963, 148-11-22(1) and 148-11-22(2) (1965 Perm. Supp.), *repealed and superseded,* Colo. Sess. Laws 1971, Ch. 372, Sec. 3.

[4]The statute involved in the Petition at bar, repealing prior legislation, was re-enacted on May 17, 1965 as the Colorado Ground Water Management Act. *See:* Colo. Sess. Laws 1965, Ch. 319.

CONCLUSION

The Respondents in the courts below established adequate necessity and sound legality for the issuance of the injunction in this matter. For this reason as well as the foregoing reasons, the Respondents state that this Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX

The text of C.R.S. 1973, 37-90-108(3) and 37-90-108(4) (1977 Supp.) provides:

> (3) A conditional permit to appropriate designated ground water shall expire and be of no force or effect at the expiration of one year from the date of its issuance, unless the conditions set forth under subsection (1) of this section have been complied with within that time, or unless extended by the commission for a period certain upon good cause shown, or unless, after the conditions set forth under subsection (4) of this section are complied with, the commission finds that the conditional permit should remain in force and effect.
>
> (4) The procedural requirement that a statement of beneficial use shall be filed shall apply to all permits wherein the water was put to beneficial use since June 30, 1969. If information pertaining to completion of the well as required in subsection (1) of this section has been received, but evidence that water has been placed to beneficial use has not been received as of the expiration date of the conditional permit, the commission shall so notify the applicant by certified mail. The notice shall give the applicant the opportunity to submit proof that the water was put to beneficial use prior to the expiration date, but, due to excusable neglect, inadvertence, or mistake, the applicant failed to submit the evidence on time. The proof must be received by the commission within twenty days of receipt of the notice by the applicant and must be accompanied by a filing fee of thirty dollars. If the proof can be given favorable consideration by the ground water commission, then, within thirty days, a synopsis of the proof shall be published, specifying that objections shall be filed within thirty days. After the expiration of the time for filing

objections, if no such objections have been filed, the commission shall, if it finds the proof to be satisfactory, find that the conditional permit should remain in force and effect. If objections have been filed together with a nonrefundable filing fee of ten dollars, the commission shall set a date for a hearing on the proof and the objections thereto and shall notify the applicant and the objectors of the time and place. The commission shall consider all evidence presented at the hearing and all other matters set forth in this section in determining whether the conditional permit should remain in force and effect.

CERTIFICATE OF SERVICE

I, John C. Ohrenschall, hereby certify, pursuant to Rule 33(3) of the Rules of the Supreme Court of the United States, that on the 27 day of October, 1978, I served the requisite number of copies of the within and foregoing Brief in Opposition of Respondents C. J. Kuiper, State Engineer, and Colorado Ground Water Commission to Petition for A Writ of Certiorari to The Colorado Supreme Court, on the Petitioner addressed to, by first class mail:

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